

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.248 of 1990

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Nawal Kishore Jha son of Anup Jha, Resident of Village-Madhubani,
P.S. Pupri, Distt-Sitamarhi.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Prasoon Sinha, Adv.

Mr. Dilip Kumar, Adv.

For the Respondent/s : Mrs. Shashi Bala Verma, APP

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CORAM: HONOURABLE MR. JUSTICE MIHIR KUMAR JHA

and

HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT


(Per: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI)

Date: 06-09-2012


Appellant Nawal Kishore Jha who has been found guilty for an offence punishable under Sections 302/34 of the IPC and has been directed to undergo RI for life as well as under Sections 307/34 of the IPC and has further been directed to undergo RI for 10 years vide judgment dated 23rd of June 1990 passed by 1st Additional Sessions Judge, Sitamarhi in connection with Sessions Trial No. 28 of 1982, has preferred instant appeal.

2. Tell-tale of prosecution version is as follows:-

On 07.08.78 at about 3:30 p.m. Ram Chandra Rai (not examined) gave his Fardbeyan (Ext-1) at Primary Health Centre, Pupri before the Officer-in-charge Pupri P.S. alleging inter alia that in the preceding night while he was lying at his Dalan, at about 10:30 p.m.




somebody called him by name. His wife also disclosed the same over which he proceeded there-from followed by his son (neither named nor examined). The call was coming from southern side and as soon as reached near the house of his brother Sialal Rai, he saw the women folk having caught hold a person south to the Baithka of Sitaram Rai (his another brother) who was indulged in fracas. He rushed and identified that person happens to be Nawal Kishore Jha of Madhubani who was armed with Bhujali and the women were trying to snatch the aforesaid Bhujali. Then thereafter, he gave a leg blow over his hand on account of which Bhujali slipped from his hand and then thereafter he also caught hold Nawal Kishore Jha. The ladies had disclosed that this man along with his associates had assaulted whereupon he found his brother, Sialal Rai and Sitaram Rai lying unconscious having brutally assaulted. Injuries were found over their head and hands. Till then, so many villagers have assembled. He directed them to tie the accused as he is going to get the injured medically examined as well as to inform the police. He further disclosed that he is not aware with the motive of the occurrence. He had also disclosed that apart from both the injured Siyalal Rai and Sitaram Rai and their inmates, Sahdeo Rai (PW-2) Manjhi Mandal (PW-3) Bilfa Mandal (not examined) along with others as eyewitnesses to the occurrence. He also disclosed that later on he came to know that other associates of Nawal Kishore Jha were Mohammedans of village Jhajhihat.



3. On the basis of the aforesaid Fardbeyan Pupri P.S. Case No. 2/1978 was initially registered under Sections 326, 307/34 of the IPC and investigation was taken up and after concluding the same, charge-sheet was submitted under Section 302 along with other Sections of the Penal Code on account of death of one of the injured, Sialal Rai during course of investigation whereupon cognizance of offences was taken followed with committal of the case which ultimately concluded in a manner which happens to be the subject matter of instant appeal.

4. The defence case as is evident from the mode of cross-examination as well as from the statement recorded under Section 313 of the Cr.P.C. is that appellant/convict is innocent and he has been falsely implicated in this false and concocted case which has purposely been launched by the prosecution to save their own skin. The further case happens to be that on the alleged date and time of occurrence while appellant/convict along with Latifur Rahman was coming and as soon as reached in front of the house of Siyalal Rai they were intercepted by the prosecution party who snatched away his belongings and during course thereof, brutally assaulted the appellant/convict resulting institution of Pupri P.S. Case No. 3/1978. To support the same had also exhibited Ext-A, Formal FIR, Ext-B, Fardbeyan of Pupri P.S Case No. 3/78.

5. Manifold argument has been advanced on behalf of the appellant while assailing the judgment of conviction and sentence recorded



by the learned trial court. The first and foremost ground is that when the evidence of the PWs have been found unreliable with regard to other co-accused who were acquitted by the learned trial court itself then in that event, the same process of scrutiny of the evidence of those PWs should also have taken place so far plea of appellant is concerned. From the judgment impugned, it is evident that the learned trial court failed to scrutinize the evidence properly with regard to interest of the appellant. Then, it has been submitted that there happens to be inherent defect persisting in the prosecution case and those are:-

(A) The informant has not been examined and for that no explanation has been adduced on behalf of prosecution

(B) Neither the doctor who had examined both the injured at Primary Health Centre, Pupri nor the doctor who had examined Sitaram Rai at Darbhanga had been produced by the prosecution and the prosecution failed to explain the reasons for their non examination.

(C) There happens to be consistent evidence on the record that after death of Siyalal Rai, his dead body was removed stealthily by the prosecution party themselves without informing the police official as well as without permitting postmortem to be conducted over dead body of Siyalal Rai and on account thereof the cause of death of Siyalal Rai has not been brought on record

(D) In likewise manner the I.O. has not been examined in this case and again prosecution has failed to

explain the reasons over his non-examination and on account thereof, the interest of the appellant is found to be prejudiced.

6. On factual aspect, it has been submitted by the learned counsel for the appellant that altogether seven witnesses have been examined on behalf of the prosecution, only evidence of PWs-4, 5 and 6 happens to be on material aspect because of the fact that none other have supported the case in its true sense. It has further been submitted that PWs-5 and 6 are mother and son and they both are inconsistent as well as contradictory on each and every material point. When the evidence of PWs-5 and 6 is taken together with the evidence of PW-4, it is evident that there happens to be material contradiction apart from contradictory version with regard to manner as well as genesis of occurrence. It has thus been submitted that on this aspect also the prosecution has failed to substantiate its case.


7. On the other hand, learned APP while supporting the judgment of conviction and sentence recorded by learned trial court has submitted that by having Exts- A and B on behalf of defence, presence of appellant/convict at the place of occurrence on the alleged date and time of occurrence is well admitted by the defence. It has also been argued that appellant/convict is not a co-villager of prosecution party rather he happens to be resident of different village (Madhubani) and so his presence at that

very moment at that very place is suggestive of the fact that he along with others had gone there with some criminal intention which ultimately resulted in injuring Sitaram Rai as well as Siyalal Rai out of whom Siyalal died.

8. In the aforesaid background, it has been submitted by the learned APP that when evidence of PW-4, 5 and 6 is taken together, the prosecution case is found to be fully proved and on account thereof the judgment of conviction and sentence recorded by the learned trial court does not warrant any sort of interference.

9. Before analysis the aforesaid submission of both the parties, it looks pertinent to incorporate the materials whatever been adduced by the prosecution during course of trial. Altogether 7 PWs have been examined out of whom PW-1 is Jinis Rai, PW-2 is Sahdeo Rai, PW-3 is Manjhi Mandal, PW-4 is Kailasiya Devi, PW-5 is Siliya Devi, PW-6 is Netlal Rai and PW-7 is Mahendra Singh. Side by side three exhibits have been brought on record. Ext-1 Fardbeyan, Ext-2 Formal FIR, Ext-3 Case diary. Defence has also exhibited FIR of Pupri P.S. Case No. 3/78 by way of Ext-A and B.


10. At a glance of record it is evident that neither I.O. nor the doctor has been examined in this case. The record further speaks with regard to non examination of informant as well as one of the injured Sitaram. Furthermore, it is also evident that neither the injury report of




respective injured persons has been brought on record nor postmortem report has been exhibited. At this juncture, it is worthwhile to mention that PW-6 Netlal Rai had deposed that no postmortem was conducted over the dead body of Siyalal Rai. Therefore, cause of death is not at all on the record along with the fact that whether the injury so allegedly sustained by deceased was in ordinary course of nature found to be sufficient for causing death of deceased Siyalal. In likewise manner, it appears on soliloquy of prosecution with regard to injury sustained by injured Sitaram. In the background of aforesaid basic infirmities persisting in the prosecution case the material on record has to be examined.

11. As stated above, on account of non examination of informant the admissibility of Fardbeyan (Ext-1) has become out of consideration and not acceptable in the eye of law. Although, the FIR in its own is not found to be substantive piece of evidence and the sole purpose of the FIR happens to be that of corroboration or contradiction with regard to the evidence of maker of document but even that has lost its identity in absence of examination of maker of the document.

12. Now coming to the evidence of PWs, it is evident that FIR named witnesses Sahdeo Rai, PW-2 and Manjhi Mandal, PW-3 had turned volte-face to the prosecution. PW-7, Mahendra Singh happens to be formal in nature. Therefore, the case of the prosecution rests upon the evidence of PWs-1, 4, 5 and 6.




13. PW-1, had claimed himself to be a Chaukidar and had deposed that during course of patrolling he had gone to Darwaja of Siyalal Rai where so many persons had assembled who were assaulting the appellant Nawal Kishore Jha. He had identified Nawal Kishore Jha in torch light. Ram Chandra Rai as well as inmates of the house were also there. He also found Siyalal Rai and Sitaram Rai in injured condition. They had spoken that Nawal Kishore Jha had assaulted them. Then thereafter, he took Siyaram and Sitaram to Hospital while people had detained Nawal Kishore Jha at the place of occurrence. After bringing the injured to the hospital, he had gone to police station to give information and Ram Chandra Rai had also accompanied him. During cross-examination, from paragraphs 3,4 and 5 it is evident that he had flashed the criminal antecedents of the prosecution party having been accused in so many cases including dacoity cases as well as witnesses happen to be convict of a murder case. In para-6, he had said that it was a dark night. He had stayed at Darwaja of Siyalal Rai for less than an hour and during course thereof he had seen two male in injured condition as well as also found Ram Chandra there. According to him Netlal Rai and Jainandan were not present there. In para-9 he had disclosed that when he reached at the place of occurrence he had seen Nawal Kishore Jha in injured condition and he had not seen any weapon in his hand. Ram Chandra got the Nawal Kishore Jha tied and did not allow him to be taken to police station. In para-11, he had disclosed




that he had returned back with Darogaji and found Nawal Kishore Jha tied with rope at the Darwaja of Siyalal Rai. At that point of time he was unconscious and his hands were found fractured and blood was also coming out from the injury. Therefore, from his evidence it is evident that he is not an eyewitness to occurrence. From his evidence it is also evident that he had seen two persons Siyalal and Sitaram in an injured condition as well as at that very time appellant/convict Nawal Kishore Jha was being brutally assaulted.

14. PW-4 happens to be Kailasia Devi wife of one of the injured Sitaram Rai. She had deposed that on the date and time of occurrence while she was sleeping, she heard sound from the house of Sahdeo Rai over which her husband had gone there. After some time, she also followed and found Siyalal Rai as well as Sitaram Rai in injured condition. They were lying in a drain by the side of the road. Nawal Kishore Jha was already apprehended since before. During cross-examination in para-3 she had narrated the event of knowing Nawal Kishore Jha since before. She had further disclosed that she had not seen any sign of assault over the person of Nawal Kishore Jha. Nawal Kishore Jha was apprehended at the spot. None had assaulted him. In para-4, she had disclosed that she had accompanied her husband to Laheriasarai Hospital and that he was not treated at Government Hospital. He husband died 3-4 months after the occurrence while Siyalal Rai had died at




Darbhanga. Both were treated in the same hospital. No postmortem was conducted over his dead body. Again this witness did not claim herself to be an eyewitness to occurrence nor she had stood within the category of hearsay witness. She had not alleged the appellant/convict Nawal Kishore Jha as an assailant of Siyalal Rai and Sitaram Rai. From evidence of this PW, it is also evident that she happens to be inconsistent with the evidence of PW-1 over presence of injury on the person of appellant/convict, Nawal Kishore Jha.

15. PW-5 is Siliya Devi wife of deceased Siyalal Rai. She had deposed that on the alleged date and time of occurrence while she was sleeping inside her house. 5-7 persons had entered. At that point of time her husband was also sleeping. The dacoits began to flee after carrying box over which her husband as well as Sitaram Rai caught hold of them and alarm was raised. Subsequently, appellant Nawal Kishore Jha had assaulted both of them and in that course her husband had sustained injury over his head. According to her appellant Nawal Kishore Jha was apprehended at the spot while rest of the dacoits had succeeded in their escape. Further she had disclosed that her husband Siyalal Rai had subsequently died. During cross-examination, she had deposed that at the time of occurrence she was awoken while her husband was sleeping inside her house. It was dark night and appellant Nawal Kishore Jha was caught hold of by her husband while rest of the dacoits had escaped. Her husband and Sitaram had sustained




injury in Aangan as a result whereof both of them fell down and became unconscious. Appellant Nawal Kishore Jha was caught hold by Sahdeo Rai and Manjhi Mandal and others. In para-4, she had disclosed that none had assaulted Nawal Kishore Jha. Her statement was recorded 3-4 days after the occurrence by the police. Then, there happens to be contradiction over the manner of occurrence. So, from evidence of this PW, it is evident that she had given a new story showing the appellant/convict as one of the dacoits who along with others had raided the house for the purpose of commission of dacoity which happens to be totally inconsistent with the evidence of PW-1 as well as PW-4. In likewise manner, she had stated that Nawal Kishore Jha was not at all assaulted at that very moment by any one.

16. PW-6 is Netlal Rai who happens to be son of PW-5. He had deposed that on the alleged date and time of occurrence while he was sleeping at his Darwaja, he had heard sound coming out from his house over which he rushed and found Nawal Kishore Jha and Sitaram Jha assaulting his father Siyalal Rai and uncle Sitaram Rai with *Bhujali* and *Katta* . Rajendra Jha, Rajeshwar Jha, Latifur Rahman were also present there along with one more whose name he is not remembering. Then he disclosed that his father and uncle had sustained injury by the side of road. Accused Latifur Rahman had gone inside his house and lifted one box having ornaments, Sari and cash. Rajendra Jha snatched away *Hansuli* from his mother. On hue and cry raised by them, so many villagers had



assembled there and had witnessed the occurrence. Appellant Nawal Kishore Jha was apprehended by his mother and other family members. Thereafter he had accompanied his uncle Ramchandra Rai to Pupri Hospital along with his father and another uncle where they were treated and then thereafter as per medical advice, they were taken to DMCH. During course of treatment his father had succumbed to his injuries. During cross-examination, he had admitted that no postmortem was held over the dead body of Siyalal Rai at DMCH as they had taken away the dead body in absence of doctor. Then he had admitted in para-7 that he along with his brother Jainandan Rai were convicted and sentenced for committing murder of Ram Chandra Rai, the informant of this case. In para-8 he had disclosed that he had slept at his Darwaja alone. After hearing alarm, he had woken up and rushed to his house where he found Jainandan, his mother Siliya Devi and wife of Sitaram Rai. He remained there for 20-25 minutes and during aforesaid intervening period so many villagers including Rudal Sah, Hemant Rai, Chhatti Lal Sah, Ram Sagar Rai came. He further disclosed that when he came at his house at that time Siyalal Rai and Sitaram Rai were standing but he did not talk to them. Then he had disclosed that he had seen the injury over the person of Siyalal Rai as well as Sitaram Rai. At para-11, he had disclosed that copious blood was found at the place of occurrence as well as apparel of his father and uncle was soaked with blood.



17. So, from his evidence it is evident that he had gone a step forward from the evidence of PW-5 and further shown PW-5 as one of the victim from whom accused Rajendra Jha had snatched away *Hansuli*. He had further contradicted the evidence of PW-5 by bringing Latifur Rahman who had gone inside the house and taken away one box. He had further shifted the place of occurrence than the one disclosed by PW-5 inasmuch as he had narrated the place of occurrence being the side of road. Not only this, he alike PW-5 had brought the theme of dacoity. However, as per his admission cross-examination, he does not appear to be an eye witness to assault. Moreover, he discredited the version of prosecution with regard to apprehension of appellant Nawal Kishore Jha by saying that he was apprehended by his mother and aunt, which PW-4 and PW-5 never claimed. He had also not shown assault over person of appellant Nawal Kishore Jha.

18. Thus, after having meticulous examination of the evidence of the material witnesses, it is evident that they all are not consistent over the manner as well as genesis of occurrence. PWs-5 and 6 tried their best to give it a colour of dacoity while PW-4 had shown it a simple case of assault. Furthermore, presence of appellant/convict Nawal Kishore Jha as assailant is also found to be suspicious on account of inconsistency in between the evidence of PWs-4 and 5. The PW-6 had named two persons Nawal Kishore Jha as well as Sitaram Jha respectively

for causing injury over the person of injured as well as deceased. All the material witnesses that means to say PWs-4, 5 and 6 have also denied presence of injury over person of Nawal Kishore Jha.

19. At this very juncture, we would not lose sight of the relevant order-sheet in consonance with the admitted fact that appellant/convict Nawal Kishore Jha was arrested from the place of occurrence on the same day & time while he was made captive. It is also evident that FIR of instant case was received at the office of judicial magistrate on 08.08.78 but at that very time accused Nawal Kishore Jha was not at all produced. He was produced on 27.08.78. For want of non examination of I.O. the intervening period has not found to be properly explained. However, from the case diary it is evident that he was referred to hospital. True it is that contents of case diary cannot be used for the purpose of judgment but its relevancy cannot be overlooked when there happens to be some sort of controversy and for the purpose of arriving at a particular conclusion with the aid of the information whatever is coming out from the case diary it can be looked into. This theme is further found supported from the presence and the contents of Ext-A and B, the Fardbeyan of appellant/convict Nawal Kishore Jha which was recorded at the place of occurrence itself on the same day.

20. In the aforesaid facts and circumstances as well as taking into account the circumstances of the case in its entirety, it is found

that the prosecution has not come with the clean hand and that happens to be reason behind the presence of inconsistency, contradictory statement amongst the PWs over the manner and genesis of occurrence. In the aforesaid background their evidence does not inspire any confidence.

21. Consequent thereupon, the finding recorded by the learned trial court is set aside. The appeal is allowed. The appellant is on bail. Hence, he is discharged from its liability.

(Mihir Kumar Jha, J)

(Aditya Kumar Trivedi, J)

Patna High Court
6th of September 2012
Md.Perwez Alam/AFR